

# IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

**THE STATE OF NEBRASKA,**

Plaintiff,

vs.

**LARRY L. RUEGGE II,**

Defendant.

Case No. CR02-33

## **ORDER ON MOTION TO DISQUALIFY**

**DATE OF HEARING:** June 2, 2003.

**DATE OF RENDITION:** June 9, 2003.

**DATE OF ENTRY:** See court clerk's file-stamp date per § 25-1301(3).

**APPEARANCES:**

For plaintiff:

Thomas P. Herzog, Holt County Attorney.

For defendant:

Rodney W. Smith, Holt County Public Defender, with defendant.

**SUBJECT OF ORDER:** Defendant's motion to disqualify county attorney.

**PROCEEDINGS:** See journal entry rendered following hearing.

**FINDINGS:** The court finds and concludes that:

1. In this post-trial motion following jury verdict convicting defendant of possession of a controlled substance, defendant seeks to disqualify the county attorney. The stipulated evidence shows that, because of events arising after the verdict, the defendant is one of a number of suspects of other crimes in which the county attorney or members of his immediate family are victims.

2. The first question is whether the defendant has standing to raise the issue. In order to have standing, a litigant must assert the litigant's own legal rights and interests, and cannot rest his or her claim on the legal rights or interests of third parties. *Hawkes v. Lewis*, 255 Neb. 447, 586 N.W.2d 430 (1998). However, in *State v. Ehlers*, 262 Neb. 247, 631 N.W.2d 471 (2001), the Supreme Court determined that the State has a sufficient interest

in preserving the integrity of a criminal proceeding to have standing to seek disqualification of defense counsel when the counsel has previously represented a proposed prosecution witness. This court concludes that the defendant has standing to raise the matter.

3. In *State v. Ehlers, supra*, the Supreme Court held that when the State brings a motion to disqualify a criminal defendant's privately retained counsel, the State bears the burden of proving that disqualification is necessary. In the civil context, the Supreme Court stated in *State ex rel. Wal-Mart v. Kortum*, 251 Neb. 805, 559 N.W.2d 496 (1997) that the party seeking to disqualify opposing counsel has the burden of clearly showing that it has a legal right to the relief sought. Where the defendant seeks to disqualify the county attorney, this court finds no explicit statement allocating the burden of proof. Language in *State v. Hatfield*, 218 Neb. 470, 356 N.W.2d 872 (1984) ("where . . . it is shown that the attorney has obtained confidential information") suggests that the moving defendant bears the burden of proof. This would conform to the standard in the civil context and with the general rule placing the burden of proof on the party seeking affirmative relief. *Bartels v. Retail Credit Co.*, 185 Neb. 304, 175 N.W.2d 292 (1970) (burden of proving the affirmative of an issue is on the party alleging it). This court concludes that the defendant bears the burden of proof on this motion.

4. The decision in *State v. Boyce*, 194 Neb. 538, 233 N.W.2d 912 (1975) squarely contradicts the defendant's position. In *Boyce*, as in the present case, the prosecutor was the purported victim of another crime allegedly committed by the defendant. The Supreme Court affirmed denial of disqualification in the first case. The *Boyce* court expressly noted that (a) the prosecutor was not the alleged victim in the case then under consideration and (b) the defendant failed to show any prosecutorial action that was not fair and impartial. The defendant in this case also failed to show any prosecutorial action that was not fair and impartial.

5. The court in *Boyce* explained that a prosecuting attorney who has a personal interest in obtaining an acquittal or conviction may be disqualified. The court observed that

where he is the actual victim of *the alleged crime*, or his property is the subject of *the alleged crime*, the cases generally find him to be disqualified. The basis for the rule is that where the county attorney is, in effect, an injured party, he has a personal interest in securing a conviction and therefore can no longer be disinterested and impartial in seeking equal justice in the public interest only. *State v. Boyce, supra*.

6. Personal animosity on the part of the prosecuting attorney toward the defendant of such a degree that it was likely to color the prosecutor's judgment as to whether to prosecute, or would cause such attorney to make highly inflammatory and prejudicial statements to the court during trial, may be sufficient to cause a conviction to be set aside. *State v. Hatfield*, 218 Neb. 470, 233 N.W.2d 912 (1975). The record does not demonstrate any such statements at trial in this case. Nor do the prosecutor's comments at the hearing on the present motion demonstrate personal animosity to the defendant. Rather, those comments illustrate an antipathy toward illegal conduct that the county attorney is charged by law to prosecute. The county attorney cannot be faulted for displaying an intense desire to perform his lawful duty.

7. A Louisiana court has stated that an appearance of bias and prejudice is not sufficient to warrant the granting of a motion to disqualify. *State v. Wainwright*, 837 So.2d 123 (La.App. 4th Cir. 2002). The Louisiana court noted that, in order to show that a district attorney should be disqualified from a case, the defendant has to prove that he was treated differently in the management of his case. *Id.* No evidence suggests that the extraneous allegations have affected any prosecutorial decision in the present case.

8. Canon 7, DR 7-103, of the Code of Professional Responsibility imposes certain duties and limitations on public prosecutors. Under DR 7-103, the guiding standard is whether the county attorney knows or it is obvious that the charges are not supported by probable cause. The jury in this case found that the crime was proved beyond a reasonable doubt. The jury verdict eliminates all questions regarding the existence of probable cause.

9. Canon 5, DR 5-101(A), of the Code of Professional Responsibility may require disqualification where the exercise of the lawyer's professional judgment will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests. The Supreme Court has expressly applied this rule to a county attorney acting as a public prosecutor. *State ex rel. NSBA v. Rhodes*, 234 Neb. 799, 453 N.W.2d 73 (1990). In the present case, there are no factual circumstances similar to those in *Rhodes*. The only "financial, business, property, or personal interest" of the prosecutor claimed to be affected in this case is the assertion that the defendant is a suspect in *other* crimes allegedly perpetrated against the county attorney or his property. Under *Boyce*, that interest is not sufficient to mandate disqualification of the county attorney in the present case.

10. The motion to disqualify the county attorney lacks merit and should be denied.

**ORDER:**

IT IS THEREFORE ORDERED that:

1. The defendant's motion to disqualify the county attorney is denied.

Signed at O'Neill, Nebraska, on June 9, 2003;  
DEEMED ENTERED upon file stamp date by court clerk.  
If checked, the court clerk shall:

[X] Mail a copy of this order to all counsel of record and any pro se parties.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

[X] If not already done, immediately transcribe trial docket entry dictated in open court.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

Mailed to:

BY THE COURT:

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William B. Cassel  
District Judge